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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL 20 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)
)
Petition for Rule Making of)
Ameritech New Media, Inc.)
Regarding Development of Competition)
and Diversity in Video Programming)
Distribution and Carriage)

CS Docket No. 97-248 /

RM No. 9097

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To: The Commission

EX PARTE COMMENTS OF MOULTRIE TELECOMMUNICATIONS, INC.

1. Moultrie Telecommunications, Inc. ("Moultrie") hereby submits these *ex parte* Comments in the above-referenced rule making proceeding regarding the FCC's program access rules. Through its provision of cable television multichannel video services to residents in the Lovington, Illinois and surrounding area, Moultrie has faced certain obstacles in the past with respect to its acquisition of quality programming to add to its system for the entertainment and education of its subscribers, obstacles that are similar to those described by Ameritech New Media and other participants in the above-referenced proceeding. Thus, Moultrie supports the modification of the FCC's program access rules to include (1) an expedited review of access complaints at the FCC, (2) the right to discovery for *all* complainants that choose to exercise it (instead of merely for those for which the Commission deems it necessary), and (3) imposition of significant economic penalties in the form of fines or monetary damages for violation of the FCC's program access rules.

2. As the Commission describes in the *NPRM*, Section 628 of the Communications Act of 1934, as amended, “prohibits unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming.”¹ It is intended to “increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.”² As required by the Communications Act, the Commission promulgated program access rules in 1993 to implement Section 628,³ yet unfortunately, the current rules fall short of what is necessary to ensure that access to quality programming by *all* multichannel video programming providers is fair and nondiscriminatory. For this reason, the rules should be changed.

3. Time Limits for Complaint Resolution. Specifically, Moultrie supports Ameritech New Media’s proposal that the Commission resolve program access complaints within 90 days after the complaint is filed, if discovery is not elected by the complainant, and within 150 days if discovery is in fact elected. Moultrie also supports reducing to 20 days the current 30-day requirement for a defendant to file an answer after it is served with a complaint, and reducing to 15 days the current 20-day requirement for a complainant to file its reply if no discovery is elected, or alternatively, to replace the reply with a status conference within five

¹ *Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 22840, 22841 (1997) (“*NPRM*”).

² *Id.*

³ *Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order*, 8 FCC Rcd 3359 (1993).

days of the filing of the answer where discovery is elected. These procedural changes would ensure that program access complaints were processed and acted upon in an expedited manner that is more reasonable for the program provider's ongoing business than the lengthier process which is used today.

4. While Moultrie understands the Commission's and other parties' concerns that a shorter amount of time for complaint resolution might not allow an extremely thorough investigation into the complaint's allegations in very complicated circumstances, Moultrie believes that the expedited deadlines would be adequate in the vast majority of cases and thus it supports the proposal. Imposition of fixed resolution deadlines for program access complaints would enable program providers to know how long it would take to process and resolve their complaints (predictability) and would promote efficiency in the processing of such complaints since they would have to be resolved within a certain shorter amount of time. Similar deadlines have already been successfully implemented in the Commission's cable must-carry process. The benefits of an expedited timetable for resolution of program access complaints outweigh the remote possibility that a very complicated case would not get adequate attention before a decision would have to be issued.

5. Discovery as of Right. Moultrie also supports Ameritech New Media's proposal to grant complainants in program access complaint proceedings the right to allow discovery in all cases where the *complainant* deems it necessary to prove its case, not where the FCC deems it necessary as the current rules provide. Although the FCC's decision of whether discovery is needed in a particular case is no doubt considered and made in good faith, the FCC is the neutral decision-making party in the dispute and *should not* be the one to decide for the complainant whether or not the complainant will need further information to prove its case against the

defendant. If the complainant is never allowed to discover adequately certain details of the defendant's business practices which led to the complaint, how is the complainant to prove its complaint is valid?

6. At the very least, if the Commission will not amend its program access rules to allow discovery in all cases if the complainant believes it is necessary, then in cases where the Commission does not deem it necessary, the burden should be placed on the defendant to show that no unfair or discriminatory practices occurred in its relationship with the complainant. The defendant typically has most if not all of the information needed to show what transpired between the parties, as well as the defendant's behavior with respect to other providers; for this reason, it is easier for the defendant to prove that the complaint is *not* warranted than for the complainant to prove beyond mere assertions that it was treated unfairly or in a discriminatory manner.

7. Furthermore, Moultrie supports the 45-day deadline for completion of discovery and believes that this amount of time will not harm the interests of any party involved in the program access complaint process and may actually encourage efficiency in response to and resolution of such complaints. Toward that end, Moultrie is not opposed to expediting the discovery process by having complainants submit their proposed discovery requests with their complaints, requiring defendants to submit their proposed discovery requests and objections to the complainant's requests with the answer, and having complainants submit any objections it has to the defendant's requests with the reply. While it would require more effort to get these requests and objections prepared within a shortened time period, the benefit of an expedited overall complaint process would be well worth that effort. Moultrie also does not object to

different discovery periods for different types of access complaints that typically vary in complexity, as long as the overall 150-day period for resolution of the complaint is not reduced.

8. Economic Damages. In light of the fact that it is often difficult to obtain compliance with the Commission's rules where there is little or no detriment that will come to the rule violator once the rules are broken, Moultrie supports the imposition of stronger penalties in the form of fines and monetary damages to penalize violators of the FCC's program access rules. Such action is authorized by Section 628(e) of the Communications Act, which states that the Commission has the power to order "appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions for the sale of programming." The FCC itself has already recognized its own authority to impose such penalties for violations of the program access rules,⁴ yet it has chosen not to impose such fines to date. The result is that potential violators of the rules have little incentive to comply with them when it does not benefit their businesses, because they know that many valid complaints are never filed because of the lack of a meaningful remedy, even if the proceedings are eventually won by the complainants. Moultrie also agrees with Ameritech New Media that any such penalties that are assessed on violators of the program access rules should be made retroactive to the date of filing the notice of intent to initiate the Section 628 proceeding, in order to give the alleged violator an added incentive to expedite the proceeding to avoid higher penalties in the end.

9. Moultrie believes that the current forfeiture amount of \$7,500 per day for violations should be maintained because it is high enough to deter potential violators of the rules.

⁴ *Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 10 FCC Rcd 1902, 1910-11 (1994).

However, punitive damages should also be allowed where the Commission deems it necessary on a case-by-case basis when damages that are suffered by a complainant exceed the assessment of \$7,500 a day for the applicable period, or where the Commission deems such punitive damages necessary to deter future violations by a defendant.

10. For the above reasons, Moultrie supports the modification of the FCC's program access rules to include (1) an expedited review of access complaints at the FCC, (2) the right to discovery for *all* complainants that choose to exercise it (instead of merely for those for which the Commission deems it necessary), and (3) imposition of significant economic penalties in the form of fines or monetary damages for violation of the FCC's program access rules.

Respectfully submitted,

A handwritten signature in cursive script, reading "David A. Bowers".

David A. Bowers, President
Moultrie Telecommunications, Inc.

July 17, 1998